

Decision

IN THE MATTER OF
VIRGINIA EXCELSIOR MILLS, INC., ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6630. Complaint, Sept. 12, 1956—Decision, Oct. 25, 1957

Order requiring 12 manufacturers of excelsior in the State of Virginia to cease cooperatively maintaining any organization as their common selling agent; fixing or maintaining the selling price of excelsior; fixing or regulating production quotas; designating the party to whom a manufacturer could sell and the prices it could quote; and enforcing such restrictions on others, by imposition of penalties; classifying excelsior for pricing purposes; and designating conditions under which the mill stockholders could sell their mills or machines.

Mr. Floyd O. Collins for the Commission.

Mason & Stehl, by *Mr. Julien J. Mason*, of Bowling Green, Va., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On September 12, 1956, the Federal Trade Commission issued its complaint in the above-entitled proceeding, charging the manufacturers named in the caption hereof with organizing Virginia Excelsior Mills, Inc., hereinafter referred to as Respondent Mills, for the purpose and with the effect of destroying competition among themselves by using that organization as a common selling agency and as a medium through which they have carried out, collusively and collectively, various acts and practices, as follows:

1. Formulated, managed and controlled the policies, practices and methods of Respondent Mills;
2. Fixed and maintained the selling price of excelsior;
3. Fixed a production quota for each manufacturer thereof;
4. Forbade the manufacturers owning stock in Respondent Mills to sell excelsior to anyone except Respondent Mills;
5. Forbade such stockholding manufacturers to quote prices to any prospective customer;
6. Established and maintained a uniform classification of excelsior, with a uniform price for each classification;
7. Fixed and maintained penalties to be imposed upon any manufacturer violating any provisions of his contract with Respondent Mills; and

8. Prohibited any stockholder manufacturer from selling his excelsior plant unless he also sold therewith his stock in Respondent Mills.

The complaint further alleges that such collusive acts and practices are all to the injury of the public and of competition, and have a dangerous tendency and capacity to, and do, unduly restrain and suppress competition in price and otherwise in the interstate sale and distribution of excelsior, and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

THE ANSWERS

On October 23, 1956, four separate answers were submitted, each on behalf of a group of Respondents, and all denying any violation of the Federal Trade Commission Act. All answers are in agreement regarding the organization, policies and practices of Respondent Mills and the contracts made with and quotas received from that organization. The various other denials and affirmations contained in these answers will be considered hereinafter in detail in connection with the analysis of the issues to which they relate.

HEARINGS AND PROPOSED FINDINGS

Hearings were held in Richmond, Virginia, on January 22 and 23, 1957, at which evidence was presented in support of and in opposition to the allegations of the complaint. Thereafter, counsel rested their cases and submitted proposed findings as to the facts and proposed conclusions.

IDENTITY AND ORGANIZATION OF THE RESPONDENTS

Respondent Mills is a Virginia corporation organized in 1938. According to its charter, it was organized to engage in all branches of the lumber, timber, excelsior and wood products business; to buy and sell lumber, timber lands and other real estate; and to own, lease and operate excelsior mills, saw mills, planing mills and manufacturing plants of all kinds for the manufacture of trees, timber and lumber into any and all kinds of timber products and by-products.

Respondents W. H. Baker, T. Frank Flippo, H. L. Taylor, and F. C. Flippo are, respectively, president, vice president, secretary and treasurer, and assistant secretary and treasurer of Respondent Mills.

Respondents T. Frank Flippo, F. Carter Flippo and Arthur P. Flippo have been for a number of years, and are now, engaged in

the manufacture, sale and distribution of excelsior, under the name of T. Frank Flippo & Sons, with their place of business at Doswell, Virginia.

Respondents H. L. Taylor, H. Ashton Taylor, G. K. Coleman, Sr., and G. K. Coleman, Jr. have been for a number of years, and are now, engaged in the manufacturing and selling of excelsior, as a partnership, under the name of Ruther Glen Excelsior Company, with their place of business at Ruther Glen, Virginia.

Respondent Thomas H. Blanton was for several years engaged in the manufacture, sale and distribution of excelsior under the name of Thomas H. Blanton Excelsior Mill, but in July of 1956, prior to the issuance of the complaint herein, he sold his excelsior mill, and since that time has not been engaged in the manufacture or sale of excelsior.

Respondents T. Nelson Haley and Jesse C. Haley have been for a number of years, and are now, engaged as a partnership in manufacturing and selling excelsior, doing business under the name of Haley Excelsior Company, at Doswell, Virginia.

Respondent W. H. Baker has been for some time, and is now, engaged in the manufacture, sale and distribution of excelsior, operating an excelsior mill under the trade name of Hallsboro Manufacturing Company, at Hallsboro, Virginia.

Respondents S. D. Quarles and J. R. Gilman have been and are now engaged as copartners in the manufacture, sale and distribution of excelsior, with their principal place of business at Ashland, Virginia. Both of these Respondents also own stock in Respondent S. D. Quarles Lumber Company, Inc.

Respondent C. J. Haley has been for a number of years, and is now, engaged in the manufacture, sale and distribution of excelsior, and, under the name of Ashland Excelsior Company, owns and operates a mill at Ashland, Virginia.

Respondents H. L. Taylor and Thomas H. Chewning, from February 14, 1954, until 1955, were copartners operating two excelsior mills, known, respectively, as Carolina Excelsior Company and Chilesburg Excelsior Company. In December, 1955, they sold out the partnership and the Carolina Excelsior Company mill is now owned and operated by Respondent H. L. Taylor, while the Chilesburg Excelsior Company mill was taken over and is now being operated by Respondent Thomas H. Chewning and his niece and nephew. Both mills are located at Chilesburg, Virginia.

Respondent Benjamin Jeter is now, and for a number of years has been, manufacturing and selling excelsior and operating an excelsior mill located at Penola, Virginia.

Respondent Noah Markey, until October, 1955, owned and operated an excelsior mill known as Markey Excelsior Company, and was engaged in the manufacture, sale and distribution of excelsior at Beaverdam, Virginia. In October, 1955, Respondent Markey ceased doing business or operating a mill, and in June, 1956, sold his mill to the Tate Wood Products of Elizabeth City, North Carolina. Respondent Markey is not now engaged in the excelsior business.

Respondent S. D. Quarles Lumber Company, Inc., a Virginia corporation, for a number of years has been, and is now, engaged in the manufacture, sale and distribution of excelsior, with its principal place of business at Ashland, Virginia.

Respondent C. T. Smith has been for a number of years, and is now, engaged in the manufacture, sale and distribution of excelsior, operating a mill located at Hanover, Virginia.

Respondents Catherine C. Wright and Dorothy E. Campbell, as trustees of the estates of D. E. Campbell and T. E. Campbell, and as copartners with Respondents Bessie S. Campbell, Ray S. Campbell, Addie C. Doswell, Elliot Campbell and E. May Campbell, for a number of years operated an excelsior mill at Doswell, Virginia, under the name of Old Dominion Excelsior Company. In July, 1956, Respondents Wright and Dorothy E. Campbell, as such trustees, sold the Old Dominion Excelsior Company mill, and have not, since that time, been engaged in any respect in the excelsior business. In July, 1956, Respondents Bessie S. Campbell, E. May Campbell and Addie C. Doswell, copartners trading as Melford Excelsior Company, at Doswell, Virginia, purchased from Respondent Blanton the Thomas H. Blanton Excelsior Company, including land, buildings, machinery and inventory.

All Respondent manufacturers herein named own stock in Respondent Mills, and participate as stockholders in the operation thereof.

RESPONDENTS' PRODUCT

Excelsior, the product here involved, is a shredded wood fiber made from various kinds of wood in different parts of the country. In Virginia it is manufactured from loblolly pine by a machine which splits and shaves off thin fibrous strips of wood. These wood fibers are made in three grades, depending upon the length of the fiber and the fineness of the shaving. The finest grade is called "wood wool." An average machine will produce about four or five tons of excelsior in a ten-hour day. Excelsior is used largely for packing fragile articles, and also for stuffing cushions, as an ab-

sorbent material in filtering processes, and for the manufacture of insulating board.

HISTORY OF THE EXCELSIOR INDUSTRY

Prior to the organization of Respondent Mills in 1938, and to an increasing degree since that time, Respondents have characterized the manufacture and sale of excelsior as a dying industry. This condition, they explained, resulted from the advent upon the market of various other products, such as shredded newspaper, corrugated wrapping material and corrugated boxes with fillers, which serve the same purposes as excelsior. For instance, many of the large department stores, which formerly bought excelsior as a packing material, now shred their own paper for that purpose. As a consequence of these circumstances, competition to supply the dwindling demand for excelsior became, by 1938, very keen, and was described as "cut-throat" competition. Also, prior to 1938, Respondents had no standard grades for excelsior, and therefore no established standard for setting prices. Witnesses also described the condition of the industry at that time as threatening ruin to all the Virginia excelsior manufacturers. In October, 1938, the various manufacturers of excelsior in Virginia, in recognition of the deplorable condition of their industry, employed one of their members, who was both a manufacturer of excelsior and an attorney, to develop a plan for the purpose of:

1. Establishing standardized grades for excelsior;
2. Stabilizing the market; and
3. Providing a means to facilitate collection by the small mills of moneys owing to them for excelsior.

The plan so developed was the organization of Respondent Mills.

ORGANIZATION AND BUSINESS PRACTICES OF RESPONDENT MILLS

Respondent Mills was incorporated in 1938 as a Virginia corporation, with fifteen Virginia manufacturers of excelsior as stockholders, and certain of their number were elected to act as members of the Board of Directors and as officials of the corporation. Respondent Franklin C. Flippo was employed as the business manager of the corporation, and still holds that position.

Immediately upon its organization, Respondent Mills entered into contracts with its manufacturing stockholders, whereby Respondent Mills agreed to buy, and the manufacturer stockholders agreed to sell, all the excelsior of every grade and kind manufactured or to be manufactured by the latter, and Respondent Mills agreed to pay the manufacturer-stockholders the net wholesale price therefor, less

an amount per ton, to be determined from time to time by the Board of Directors of Respondent Mills. The stockholder-manufacturers agreed to refer all inquiries for excelsior to Respondent Mills, and not to make any direct quotations or sales to any other party without the written consent of Respondent Mills. Respondent Mills was to designate, classify and standardize the several grades of excelsior. If the excelsior furnished failed to meet these grades, Respondent Mills was authorized to make adjustments in price therefor, at the expense of the manufacturer-stockholder.

Respondent Mills agreed to purchase from each manufacturer-stockholder a certain quota or quantity of excelsior, to be determined by Respondent Mills in proportion to the capacities of the various mills of all the manufacturer-stockholders. The contract also contained a provision that any manufacturer-stockholder failing to fulfill his quota by reason of running out of wood or because of mechanical breakdown necessitating shutting down his mill for repairs should not be assigned any quota during such period; and a further provision that no manufacturer-stockholder should increase his or its present productive capacity other than by installation of machines owned by him or it, or by another manufacturer-stockholder, at the time such contract was entered into. A penalty of \$500.00 was also provided as liquidated damages, recoverable by Respondent Mills, for any breach or violation of such contract.

This contract was automatically renewable for five additional years, unless either party thereto should give written notice to the other of intended termination at least thirty days prior to expiration of the first five-year period. All the manufacturer-stockholders entered into such a contract with Respondent Mills, and until 1954 operated thereunder.

The Board of Directors, from time to time, have held meetings whereat prices have been discussed and agreed upon. They have received requests from their manufacturer-stockholders to raise such prices. Sometimes such requests were granted; at other times they were denied.

Acting in accord with its contracts, Respondent Mills has received, and still does receive, orders for excelsior from customers located in Virginia, New York, Connecticut, Pennsylvania, New Jersey, Maryland, Delaware, the District of Columbia, North Carolina and South Carolina. Because of increased cost of transportation, it has been found unprofitable to ship excelsior beyond those areas. When such orders are received by Respondent Mills, it allocates them among its stockholder-manufacturers. Thereafter the manufacturers ship the excelsior directly to the customers, who are then billed by Respondent Mills therefor, and thereafter remit to Respondent Mills.

In due course Respondent Mills forwards such remittances to the supplying manufacturers, less the percentage agreed upon as a fee for this service. In this manner Respondents have, for a number of years, carried on a constant course of trade in interstate commerce.

About 22,000 to 26,000 tons of excelsior have been thus shipped annually, representing a gross return of about one million dollars. Such product represents from 20% to 25% of the excelsior sold in the United States, and is substantially all the excelsior manufactured in the State of Virginia north of Richmond. Although the business of Respondents has been characterized by them as declining for a number of years, they admit that the production of short-fiber excelsior since 1954 has resulted in a slight increase in business since that time.

In the sale of their product the Respondents have been in competition in commerce with other manufacturers of excelsior. The manager of Respondent Mills has described this competition as follows:

Our greatest competition has come through two mills here in Virginia which have been erected since our corporation was formed and a mill in the State of Delaware which is considerably closer to the main market than we are, and there is another mill in the lower end of the State of New Jersey which is giving us some competition. Then we sell in New York and Connecticut where we run into the competition of excelsior made in the New England states. We sell some around the Pittsburgh area even as far west as Detroit in a few instances. We run into competition with excelsior used in the midwest, mainly around the—I would call it the midwest—around the lake regions, Arkansas.

In October, 1954, a new contract was drawn between Respondent Mills and the various manufacturer-stockholders, which was to remain in effect for another five-year period. This contract was signed by all the individual manufacturers except Respondent T. Frank Flippo & Sons. As a result of that Respondent's failure to sign, the contracts were never signed by the president of Respondent Mills, and the unsigned contracts are still retained in the office of Respondent Mills. Although a number of the Respondent manufacturers testified that because the contracts had not been executed on behalf of Respondent Mills, they felt free now to quote prices or to sell to customers other than Respondent Mills, the fact remains that, except for one Respondent, they have all continued to sell their entire production of excelsior through Respondent Mills, and to observe the other provisions of the contracts as though they had been duly signed by Respondent Mills; and Respondent Mills has continued to function in the same manner as before 1954. The one Respondent who has deviated from the practice of selling to Respondent Mills, to the extent of selling to one customer direct, has

nevertheless sold at the price established by Respondent Mills, and has reported all such sales to Respondent Mills; and the tonnage so sold has been deducted from the manufacturer's quota. Thus, in fact, the acts and practices of Respondents subsequent to 1954 have not differed substantially from their acts and practices prior to that date. In fact, counsel for Respondents admits in his proposed findings that "The method of operation of Virginia Excelsior Mills, Inc., is the same today as it was when the contract which expired in October, 1954, was in force."

RESPONDENTS' CONTENTIONS

Counsel for the Respondents admits that the price at which Respondent manufacturer-stockholders sell their excelsior is determined by Respondent Mills. He contends, however, that Respondent Mills does not actually establish such prices, but that it merely followed the trend of the market and the prices set by other manufacturers and sellers of excelsior and competing products, which are not members of Respondent Mills. Such contention overlooks the history of the Respondents' "cutthroat competition" prior to 1938, and the complete absence of such competition, or any competition, among the Respondents subsequent to that year. Furthermore, this contention fails as a defense because it does not explain or justify the facts that the Respondent manufacturers are meeting competition from other areas, not as individual manufacturers, but as a marketing unit; and that their quotations for excelsior are, without exception, the same, and all emanate, not from the manufacturers individually, as in free competition, but from Respondent Mills. We must conclude, therefore, that by contractual agreement prior to 1954, and by tacit agreement and a common course of action since that time, Respondents have, through Respondent Mills, effectively established among themselves a common selling price of excelsior.

Counsel for the Respondents also contends that because counsel supporting the complaint has failed to prove that the Respondents, through such price maintenance, have dominated or controlled the marketing of excelsior on the eastern seaboard of the United States, he has failed to establish that the public interest is affected by their acts and practices. This contention overlooks the authoritative pronouncement of the Supreme Court of the United States in the case of *U.S. v. Socony Vacuum Oil Company*, 310 U.S. 150 (1940), wherein the Court stated that:

* * * Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered,

or stabilized prices they would be directly interfering with the free play of market forces (310 U.S. 221).

Accordingly, since the Respondents in the present instance have not only combined together to determine prices, but have stabilized such prices to the extent that they all sell at a common price, coupled with the fact that the extent of Respondents' business, both geographically and financially, is substantial, we must conclude that public interest in this proceeding exists, and is also substantial.

Although counsel for Respondents has admitted that all Respondent manufacturers sell at a common price, yet he further contends that they are in competition with each other in the purchase of raw material and the procuring of labor. Even admitting this to be true, counsel's contention defeats its own purpose, because the prices paid for labor and raw material are properly elements to be taken into account in a proper determination of a competitive selling price. In free competition, the difference in labor and raw-material costs between one manufacturer and another would tend to result in a proportionate difference in the selling prices quoted by such manufacturers. No such difference is apparent in the Respondents' selling prices, which are all identical.

Another contention of counsel for Respondents is that while a quota was provided for in the original contract, it was never abided by. This contention presents no valid defense because, aside from the quota provision of the contract, which was based on potential productive capacity, the Respondents were otherwise circumscribed in the production of excelsior by the clause which forbade their acquisition of any new machinery, thus limiting their productive capacity to that afforded by the machines that they already owned or could buy from or consolidate with other contracting manufacturers. This effectively limited their productivity without the necessity of establishing any stated amount or "quota" of excelsior to be produced.

The contention of counsel for the Respondents relating to the absence of any contract since 1954 has been hereinabove sufficiently discussed to show that such contention has no practical or legal merit herein.

Finally, counsel for the Respondents complains of the use of the word "collusion" in the complaint because it denotes a secret, underhanded understanding, contrary to the facts. In justice to the Respondents, we must find that the organization of Respondent Mills, and the acts and practices consequent thereto, cannot be characterized as secret or underhanded. Respondents' conduct, however, constituted collusion in the sense that they entered into an agreement to obtain an object forbidden by law.

DISCONTINUED BUSINESSES

The record shows that Respondents Thomas L. Blanton, Noah Markey, Catherine C. Wright and Dorothy E. Campbell have all, prior to the issuance of the complaint herein, ceased to engage in the manufacture and sale of excelsior. Furthermore, such Respondents have stated in their answers to the complaint herein that they do not expect to engage in that business in the future. It appears, therefore, that there is no public interest in the issuance of a cease and desist order at this time against such Respondents. Accordingly, the complaint, insofar as it relates to them, should be dismissed without prejudice as to the right of the Commission to take such further action as future facts may warrant.

CONCLUSIONS

Based upon consideration of the entire record, and in consonance with the applicable principles of law and precedent, we conclude:

1. That the Federal Trade Commission has jurisdiction over the Respondents and over their acts and practices alleged in the complaint herein to be unlawful;

2. That this proceeding is in the interest of the public and that public interest herein is substantial; and

3. That such acts and practices of the Respondents as herein found are and have been to the injury of the public and to competition in the sale and distribution of excelsior; have unduly restricted and restrained competition in price and otherwise in the production and interstate sale and distribution of excelsior; have completely destroyed competition among themselves in such sale and distribution; and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

Accordingly,

It is ordered, That Respondents Virginia Excelsior Mills, Inc., a corporation, W. H. Baker, T. Frank Flippo, H. L. Taylor and F. C. Flippo, individuals and officers of Respondent Virginia Excelsior Mills, Inc., T. Frank Flippo, F. Carter Flippo, and Arthur P. Flippo, individuals and copartners trading as T. Frank Flippo & Sons, H. L. Taylor, H. Ashton Taylor, G. K. Coleman, Sr., and G. K. Coleman, Jr., individuals and copartners trading as Rutherglen Excelsior Company, T. Nelson Haley and Jesse C. Haley, individuals and copartners trading as Haley Excelsior Company, W. H. Baker, an individual trading as Hallsboro Manufacturing Company, S. D. Quarles and J. R. Gilman, individuals and co-

partners trading as Penola Excelsior Company, C. J. Haley, an individual trading as Ashland Excelsior Company, H. L. Taylor and Thomas H. Chewning, individuals and copartners trading as Carolina Excelsior Company, and as Chilesburg Excelsior Company, Benjamin Jeter, an individual trading as Benjamin Jeter, S. D. Quarles Lumber Company, Inc., a corporation, C. T. Smith, an individual trading as C. T. Smith, Ray S. Campbell, Addie C. Doswell, Elliot Campbell, E. May Campbell, and Bessie S. Campbell, individuals and copartners trading and doing business as Mel-ford Excelsior Company, and said respective Respondents' officers, agents, representatives and employees, in or in connection with the production, offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of excelsior, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any combination, agreement, understanding, or planned common course of action between any two or more of said Respondents, or between or among any one or more of said Respondents and others not parties hereto, to do or perform any of the following acts or practices:

1. Operating or maintaining the Respondent Virginia Excelsior Mills, Inc., or any other corporation or organization as a common selling agent;
2. Fixing the selling price of excelsior or maintaining any prices so fixed;
3. Fixing or in any wise regulating production quotas;
4. Restricting manufacturers in selling and offering excelsior for sale by
 - a. designating the party to whom they or either of them can sell;
 - b. designating the party to whom they or either of them can offer to sell;
 - c. designating the party to whom they or either of them can quote prices;
 - d. designating the prices which they or either of them can quote;or
 - e. imposing any other restriction, or enforcing any such restriction by the imposition of penalties, or otherwise;
5. Classifying excelsior for pricing purposes;
6. Designating conditions under which mill owners who own stock in Respondent Virginia Excelsior Mills, Inc., may sell their mills or machines.

It is further ordered, That the complaint herein, insofar as it relates to Respondents Thomas L. Blanton, Noah Markey, Catherine C. Wright and Dorothy E. Campbell, be, and the same hereby is,

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dismissed without prejudice to the right of the Commission to take such action in the future as the facts may then warrant.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, filed under Section 5 of the Federal Trade Commission Act, alleges the creation and operation of respondent Virginia Excelsior Mills, Inc. by the remaining respondents as a common selling agent to sell their product, excelsior, with the purpose and effect of interfering with competition as hereinafter referred to. After a hearing, the hearing examiner dismissed the complaint as to respondents Thomas L. Blanton, Noah Markey, Catherine C. Wright and Dorothy E. Campbell, on the ground that said respondents had, prior to the issuance of the complaint, ceased to manufacture or sell excelsior, and had made a sufficient showing of intention not to engage in such business in the future. As to the remaining respondents (hereinafter referred to as respondents), an order was entered, from which this appeal is taken.

During the times in question, respondents, except Virginia Excelsior Mills, Inc., have been engaged in the production of excelsior in Virginia. Excelsior is a shredded wood fiber made by respondents from loblolly pine. Its principal use is for packing purposes, although it is also used for stuffing cushions, for filtering purposes, and for the manufacture of insulating board.

Prior to 1938, certain difficulties had arisen particularly in the sale and distribution of excelsior. Competition was keen not only from other producers of the same product but also from producers of other products, such as shredded newspapers, corrugated wrapping material, and others. Respondents were small and without the financing to carry on effective advertising and sales campaigns. Furthermore, many buyers of their product were not strong financially and collections were a problem. Some witnesses described the condition of the industry as such as to threaten ruin to the Virginia manufacturers.

In 1938, certain of these manufacturers, including some of respondents, employed an attorney (who was also at that time a producer of excelsior) to develop a plan to aid the industry. The general objectives, as described by various witnesses, were:

- (1) To establish standardized grades for excelsior;
- (2) To stabilize the market; and
- (3) To provide means for facilitating collection for product sold.

In pursuance of this plan, respondent Virginia Excelsior Mills, Inc. was incorporated on or about October 10, 1938. Among other

things, one purpose of the corporation was to buy and sell excelsior (including sales on commission) and to buy and sell lumber, cord wood, railroad ties and every kind of manufactured timber product and by-product. Authorized capital stock was from \$500 to \$15,000 divided into shares of common stock with a par value of \$5.00. Fifteen Virginia manufacturers of excelsior were stockholders and the Board of Directors and officers were chosen from such group.

Immediately thereafter, the corporation entered into separate contracts with its stockholders by which, in effect, Excelsior Mills undertook the sale of the excelsior manufactured by its manufacturing stockholders in accordance with the terms laid down in the contract. For example, orders received by Mills were to be allocated among the stockholders in the same ratio as the manufacturing capacity of that stockholder bore to the total capacity of all stockholders. Individual shipments were to be made to the customers in the name of Mills as consignor and Mills was to remit to the stockholder net price received less a flat charge not to exceed 50¢ a ton, such payment to be made whether or not Mills made collection from the customer. The quota so fixed to the stockholder was not transferable and if for any reason it could not be filled, it was not to accumulate. The contract also contained provisions for standardization of product and for the assessment of liquidated damages in the amount of \$500 for breach of contract. The contract also prohibited any stockholder manufacturer from increasing his productive capacity other than by interchange of machinery or consolidation with other stockholders who had entered into like contracts with Mills. The stockholders agreed to refer all inquiries for excelsior to Mills and not to make quotations of prices or direct sales to parties other than Mills without the written consent of the latter.

Performance under the contract was substantially in accordance with its terms, although there was difficulty in the quota arrangement because of the inability of individual producers to always make shipment in accordance with transportation or other requirements. Individual stockholders testified that they did not look for independent business and did not quote prices. In fact, they were not asked to do so. Prices were set by Mills. Requests of stockholders for changes were granted or refused depending upon the state of the market. The contracts were automatically renewable for additional periods and were so renewed until October, 1954, when a new contract was drawn for a five-year period and signed by all of the stockholders except respondent T. Frank Flippo and

Sons. The reason for this failure to sign was that this respondent had readjusted its manufacturing process for the making of short fiber excelsior and wished certain changes made in the contract because of that fact. Because of the failure of T. Frank Flippo and Sons to sign, respondent Mills did not sign or return any of the contracts and, at the time of the hearing, they were being held in the office of Mills. However, performance continued substantially as before.

It is obvious that the purpose and result of the agreements was to fix the price at which the product of the manufacturing respondents was sold. That such conduct is unlawful *per se* under the Sherman Act and is an unfair method of competition under the Federal Trade Commission Act is well settled.

Respondents in this connection cite *Appalachian Coals, Inc. v. U.S.* (1933), 288 U.S. 344. Some of the language in this case is difficult to reconcile with previous and subsequent cases. Nevertheless, the actual decision is a somewhat narrow one. The Supreme Court (with one Justice dissenting) reversed the decision of the lower court which had issued an injunction restraining the putting into operation of a plan for concerted action which the Government claimed would violate the Sherman Act. There were many unusual circumstances in the case. Due principally to the depression, many factors were at work which were bringing chaos into the coal industry. It should be noted, too, that the Supreme Court directed that the lower court should retain jurisdiction of the cause and might set aside the decree and take further proceedings if future developments justified that course in appropriate enforcement of the antitrust act.

The law with reference to actual price fixing is more accurately stated in cases such as *U.S. v. Socony-Vacuum Oil Company* (1940) 310 U.S. 150, and *U.S. v. Trenton Potteries*, 273 U.S. 392.

The law now seems well settled that, while in many activities, the planned common course of action of members of an industry will be subjected to the test of reasonableness, nevertheless, agreements to fix prices are unlawful *per se*. No showing of competitive abuses or evils which the price fixing plan is designed to remove may be set up as a defense.

Respondents also contend that there is not sufficient proof to show that they control the price of excelsior which they sell in the market.

On this point, the hearing examiner found:

About 22,000 to 26,000 tons of excelsior have been thus shipped annually, representing a gross return of about one million dollars. Such product represents from 20% to 25% of the excelsior sold in the United States, and is substantially all the excelsior manufactured in the State of Virginia north of

Richmond. Although the business of respondents has been characterized by them as declining for a number of years, they admit that the production of short-fiber excelsior since 1954 has resulted in a slight increase in business since that time.

The cases cited and others have disposed of this argument. As pointed out in *Socony-Vacuum, supra*, at page 225:

It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. See *United States v. Trenton Pottery Co.*, 273 U.S. 392, 402. Cf. *Retail Lumber Dealers' Assn. v. State*, 95 Miss. 337; 48 So. 1021. And the amount of interstate or foreign trade involved is not material (*Montague & Co. v. Lowry*, 193 U.S. 38), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. *Steers v. United States*, 192 Fed. 1, 5; *Patterson v. United States*, 222 Fed. 599, 618-619.

See also *Truck Drivers' Local No. 421 v. U.S.*, 128 F. 2d 227.

The order of the hearing examiner requires the respondents to:

* * * forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any combination, agreement, understanding, or planned common course of action between any two or more of said Respondents, or between or among any one or more of said Respondents and others not parties hereto, to do or perform any of the following acts or practices:

1. Operating or maintaining the Respondent Virginia Excelsior Mills, Inc., or any other corporation or organization as a common selling agent;
2. Fixing the selling price of excelsior or maintaining any prices so fixed;
3. Fixing or in any wise regulating production quotas;
4. Restricting manufacturers in selling and offering excelsior for sale by
 - a. designating the party to whom they or either of them can sell;
 - b. designating the party to whom they or either of them can offer to sell;
 - c. designating the party to whom they or either of them can quote prices;
 - d. designating the prices which they or either of them can quote; or
 - e. imposing any other restriction, or enforcing any such restriction by the imposition of penalties, or otherwise;
5. Classifying excelsior for pricing purposes;
6. Designating conditions under which mill owners who own stock in Respondent Virginia Excelsior Mills, Inc. may sell their mills or machines.

Respondents argue that: "The order would require each and every one of the respondents and others *not parties* to the proceeding from quoting prices to anybody, from fixing their own individual selling prices, from the respondents separately classifying excelsior for pricing purposes and from using a common selling agent." The order, however, is not subject to this objection. Its prohibition is directed against "combination, agreement, understanding, or planned common course of action" in regard to certain matters. See *Milk and Ice Cream Institute v. FTC*, 152 F. 2d 478.

The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission.

Order

54 F.T.C.

The appeal of respondents is denied and it is directed that an order issue accordingly.

FINAL ORDER

Counsel for the respondents having filed appeal from the initial decision of the hearing examiner and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision denying the appeal of the respondents and adopting the initial decision as the decision of the Commission:

It is ordered, That respondents, Virginia Excelsior Mills, Inc., a corporation, W. H. Baker, T. Frank Flippo, H. L. Taylor and F. C. Flippo, individuals and officers of said corporation, F. Carter Flippo, Arthur P. Flippo, H. Ashton Taylor, G. K. Coleman, Sr., G. K. Coleman, Jr., T. Nelson Haley, Jesse C. Haley, S. D. Quarles, J. R. Gilman, C. J. Haley, Thomas H. Chewning, Benjamin Jeter, S. D. Quarles Lumber Company, Inc., a corporation, C. T. Smith, Ray S. Campbell, Addie C. Doswell, Elliott Campbell, E. May Campbell, Bessie S. Campbell, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Decision

IN THE MATTER OF
WOLVERINE LABORATORIES, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6829. Complaint, July 8, 1957—Decision, Oct. 25, 1957*

Consent order requiring distributors in Detroit, Mich., to cease representing falsely through advertising mats furnished to dealer-purchasers—in payment for use of which in advertising they participated—and through display cards and circulars also furnished for dealers' use, that their preparation "Alpha Tablets" constituted an effective treatment for all kinds of arthritis, rheumatism, neuritis, and neuralgia, and afforded complete and permanent relief from the pains and discomforts thereof; that it was a new discovery and a new medicine; that the alfalfa ingredient was of value in such treatment; and through use of the words "Manufacturers" and "Laboratories" on stationery and in advertising literature, that they manufactured the product.

Harold A. Kennedy, Esq., for the Commission.
Respondents, *pro se*.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on July 8, 1957, charging them with having violated the Federal Trade Commission Act as set forth in said complaint. After issuance and service of the complaint, all respondents entered into an agreement, dated August 5, 1957, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the Director and the Assistant Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to